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DATO' LOW TUCK CHOY

v.

BURSA MALAYSIA BHD

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HIGH COURT MALAYA, KUALA LUMPUR

MOHD ZAWAWI SALLEH J

[JUDICIAL REVIEW NO: R2-25-147-2008]

23 FEBRUARY 2011

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ADMINISTRATIVE LAW: *Judicial Review - Certiorari - Application to quash decision by Bursa Securities - Breach of Listing Requirements by applicant - Imposition of fine - Whether Bursa's action within prescribed principles of law - Whether there was procedural impropriety in decision making by Bursa - Whether relevant facts and circumstances considered before decision made*

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Bursa Securities sent a show cause notice to the applicant, the Managing Director of Ho Hup Construction Company Bhd ('HHCCB') requiring the company to make a written representation supported by documentary evidence as to why Bursa Securities should not find HHCCB to be in breach of para. 16.11 of the Listing Requirements ('LR') and impose one or more of the penalties pursuant to para. 16.12(1)(b) of the LR for its failure to submit the Annual Audited Accounts 2006, first quarter Report 2007 and Annual Report 2006, within the stipulated time frames. The applicant replied citing the delay in the completion of the audited financial accounts from HHCCB's international subsidiaries as well as some technical problems in HHCCB's accounting software. Subsequently, after several postponement for the deliberation of the matter, the Disciplinary Committee deliberated the matter and found the applicant to be in breach and imposed fine totalling to RM85,000. The applicant appealed to Bursa Securities and was informed that the Appeals Committee would deliberate on the appeal. In the meantime, the applicant applied for oral hearing to which the Appeals Committee requested for a written justification to support the request for oral hearing. The applicant provided the written justification. However, the applicant was informed by Bursa Securities that the Appeals Committee had rejected the applicant's request for oral representations as they decided upon consideration of all facts and circumstances of the applicant's request that the appeal could be

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adequately dealt with based on written representation. The Appeals Committee therefore, after having considered all the facts and circumstances of the matter, decided to dismiss the appeal and upheld the decision of the Disciplinary Committee. Hence, the application by the applicant for judicial review under O. 53 of the Rules of the High Court 1980 for an order of *certiorari* to quash the decision of the respondent. The issues raised by the applicant were, *inter alia*: (i) whether the respondent had failed to give sufficient consideration to the reasons for the delay in submitting HHCCB's financial statements within the stipulated time frames; (ii) whether the applicant was able, willing and ready to attend the deliberation fixed before the DC; and (iii) that Bursa Securities had improperly rejected the applicant's request for oral representation before the Appeals Committee.

Held (dismissing application with costs):

- (1) Bursa Malaysia had acted in accordance with the relevant principles prescribed by law after taking into consideration the reasons given by the applicant in making its decision, both at the Disciplinary Committee level as well as Appeals Committee. It was not the court's role to determine as to whether or not Bursa Malaysia should accept or reject such explanation. (paras 21-22)
- (2) The court would only interfere if it was shown that, the impugned decision was contrary to the law, relevant factors were not considered, irrelevant factors were considered or that the decision was one which no reasonable person could have taken. On the facts, the appellant had failed to demonstrate that there was procedural impropriety in the decision making process nor could it say that the impugned decision was based on grounds of illegality or irrationality. To demonstrate that a different conclusion could have been arrived was not sufficient to warrant an order of *certiorari*. (para 25)
- (3) The attendance in person is not a matter of fundamental right. The directors may request for oral hearing and must provide detailed justification as to why the matter could not be adequately determined based on written submissions. However, the ultimate decision was based upon the Listing Committee, Disciplinary Committee or the Appeals Committee accordingly. The procedure had been laid out for the applicant in relation

A to the enforcement proceedings that was to be taken against him. Bursa Securities had taken into consideration the relevant facts which were submitted by the applicant. Hence, there was no reason for the court to impede with the decision taken by Bursa Securities. (paras 27 & 28)

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Case(s) referred to:

Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1 KB 223 (*refd*)

Chief Constable of the North Wales Police v. Evans [1982] 1 WLR 1155 (*refd*)

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Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh [1997] 2 CLJ 11 SC (*refd*)

Malayan Banking Bhd v. Association of Bank Officers Peninsular Malaysia & Industrial Court [1988] 1 CLJ 276; [1988] 1 CLJ (Rep) 183 SC (*refd*)

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R v. International Stock Exchange of the UK and Ireland Ltd, ex parte Else Ltd [1993] 1 QB 534 (*refd*)

R v. Sec of State for Home Dept Ex p Brind [1991] IAC 696 (*refd*)

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC (*refd*)

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Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v. Bursa Malaysia Bhd [2010] 6 CLJ 581 HC (*refd*)

Legislation referred to:

Capital Markets and Services Act 2007, ss. 11, 15

Rules of the High Court 1980, O. 53

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For the applicant - K Sarasvathi; M/s Dorairaj, Low & Teh

For the respondent - Preetha Pillai (Ruth Garnet Maran with her); M/s Skrine

Reported by S Barathi

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JUDGMENT

Mohd Zawawi Salleh J:

Introduction

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[1] This is an application for judicial review under O. 53 of the Rules of High Court 1980 ("RHC") for an order of *certiorari* to quash the whole decision of the respondent to impose a fine of RM85,000 pursuant to the breach of para. 16.11(b) of the Listing

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Requirements on 4 April 2008 ("impugned decision") and for an order for stay of all further actions by the respondent in respect of the said amount pending the final determination for an order of *certiorari*.

[2] *Ex parte* leave for judicial review was granted on 15 September 2008 whilst the application proper was heard on 19 August 2010. After hearing both parties and having read the relevant cause papers, I dismissed this application with costs of RM2,000 to the respondent.

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The Parties

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[3] The respondent, Bursa Malaysia Berhad ("Bursa Malaysia"), is an exchange holding company, approved under s. 15 of the Capital Markets and Services Act 2007 ("CMSA"). It operates a fully-integrated exchange, offering the complete range of exchange-related services including trading, clearing, settlement and depository services. It also has a statutory duty pursuant to s. 11 of the CMSA such as to ensure, so far as may be reasonably practicable, an orderly and fair market in the securities or futures contracts that are traded through its facilities and to take appropriate action as may be provided for under its rules for the purpose of monitoring or securing compliance with such rules.

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[4] One of the rules administered by Bursa Securities in regulating Securities in Malaysia is the Listing Requirements of Bursa Malaysia Securities Berhad ("LR"). The purpose of LR is to set out the requirements that must be complied with by all applicants, listed issuers, management companies, trustees, their directors, officers, advisers or other persons to whom these LR are directed. Failure to comply with any of these LR will amount to a breach in respect of which, actions may be taken or penalties may be imposed or both (see para. 2.02 of the LR).

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[5] The principles on which these LR are based, include, *inter alia*, that the investors and the public will be kept fully-informed by the listed issuers of all facts or information that might affect their interests and in particular, full, accurate and timely disclosure will be made of any information which may reasonably be expected to have a material effect on the price, value or market activity in the securities of listed issuers (see para. 2.03 of the LR).

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[6] The applicant on the other hand, is the Managing Director of Ho Hup Construction Company Berhad ("HHCCB") who was in charge of managing all of the affairs of HHCCB and had the primary responsibility to ensure the proper discharge of HHCCB's obligations under the LR. HHCCB is a company listed with Bursa Malaysia.

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A Background Facts

[7] On 17 July 2007, Bursa Securities sent a show cause notice to the applicant as the Managing Director of HHCCB requiring HHCCB to make written representation with supported documentary evidence to them within five working days as to why Bursa Securities should not find HHCCB to be in breach of para. 16.11 of the LR and impose one or more of the penalties pursuant to para. 16.12 (1)(b) of the LR for HHCCB's failure to submit the annual audited accounts 2006 ("AAA"), 1st quarter report 2007 ("QR") and annual report 2006 ("AR"), within the stipulated time frames pursuant to paras. 9.23(b), 9.22(1) and 9.23(a) of the LR respectively.

[8] The applicant replied *vide* a letter dated 23 July 2007, detailing at length the reasons for the delay in to the queries by Bursa Securities citing the delay in the completion of the audited financial accounts from HHCCB's international subsidiaries in Madagascar, Mauritius and South Africa as well as some technical problems in HHCCB's accounting software.

[9] On 2 October 2007, Bursa Securities informed the applicant that the Listing Committee will hear or deliberate the matter on 11 October 2007. Attached to the letter was a copy of the Listing Committee Memo No. 111 of 2007 and a copy of the enforcement procedures against directors of listed issuers that would be applicable in relation to the enforcement proceedings taken against the applicant.

[10] The meeting on 11 October 2007 was postponed as one of the members of the Listing Committee was at that time a Non-Executive Chairman of HHCCB. *Vide* a letter dated 23 November 2007, Bursa Securities informed the applicant of the new meeting date ie, 30 November 2007 which is now before the Disciplinary Committee. HHCCB *via* its Executive Director, replied on 27 November 2007 confirming the attendance of the applicant and five other directors of HHCCB.

[11] The Disciplinary Committee meeting on 30 November 2007 was again postponed to 11 December 2007. The applicant, *vide* a letter dated 10 December 2007, informed Bursa Securities that he could not attend the said Disciplinary Committee meeting scheduled on 11 December 2007 but three other directors from HHCCB would be attending the said meeting.

[12] On 11 December 2007, the Disciplinary Committee deliberated the matter and decided to find the applicant to be in breach of paras. 9.22(1), 9.23(a), 9.23(b) and 16.11(a) and/or (b). On 17 December 2007, a total fine of RM85,000 was to be imposed on the applicant for the abovementioned breaches, the breakdown of which are as follows:

	Delayed Financial Statements	Delay (Market Days)	Fine Imposed (RM)
i	AAA 2006	64	32,000
ii	AR 2006	48	24,000
iii	1st QR 2007	59	29,500
	TOTAL		85,500

[13] Naturally, the applicant was dissatisfied and appealed to Bursa Securities requesting Bursa to reconsider the fine imposed on him by either a reduction of penalty imposed or a substitution of the fine with a reprimand. This can be seen *via* his letter dated 28 December 2007.

[14] Bursa Securities informed the applicant that the Appeals Committee will deliberate on the applicant's appeal on 25 January 2008 and was later re-scheduled to 29 January 2008, 5 February 2008 and later to 19 March 2008.

[15] In the meantime, applicant requested for an oral hearing for his appeal before the Appeals Committee. The Appeals Committee requested for a written justification to support the oral hearing request. The applicant provided the written justification *vide* his letter dated 18 February 2008.

[16] In his letter, the applicant explained that several additional grounds in support of his appeal were omitted, for example, the fact that he was hospitalised for bilateral hip replacement surgeries and was on medical leave from 8 March 2007 to 19 April 2007 and from 16 June 2007 to 28 July 2007 as well as his position *vis-à-vis* the Board of Directors of the company which contributed to the delay will be best explained verbally.

- A [17] On 4 April 2008, Bursa Securities wrote to the applicant to inform him that the Appeals Committee had rejected the applicant's request for oral representations before the Appeal Committees as they decided upon consideration of all facts and circumstances of the applicant's request that such appeal can be
- B adequately dealt with based on written representations. Bursa Securities also informed the applicant that after having considered all of the facts and circumstances of the matter, the Appeal Committee decided to dismiss the appeal and upheld the decision of the Disciplinary Committee which was communicated to the
- C applicant *vide* their letter dated 17 December 2007.

Issues Raised by the Applicant

- [18] There were three issues raised by the applicant which can be succinctly described as follows:
- D (a) that Bursa Malaysia failed to give sufficient consideration to the reasons for the delay in submitting HHCCB's financial statements within the stipulated timeframes;
- E (b) that the applicant was at all times able, willing and ready to attend the deliberation fixed before the Disciplinary Committee but the unfortunate postponements resulted in the applicant missing the hearing *albeit* with valid reasons; and
- F (c) that the Bursa Securities rejected the applicant's request to make oral representation before the Appeal Committee in respect of the breaches and the fine imposed by Bursa Securities.

Findings of the Court

- G [19] It is trite law that where judicial review is concerned, the court is not concerned with the decision, but with the decision making process. Without this restriction, the court will be, under the guise of preventing the abuse of power, be itself guilty of
- H usurping power (per Lord Brightman at p. 1173 in *Chief Constable of the North Wales Police v. Evans* [1982] 1 WLR 1155).
- I [20] As regard to the first issue, Bursa Malaysia replied that they have taken sufficient consideration to the reasons given by the applicant. Upon such consideration, they are of the opinion that the applicant had failed to provide reasonable explanation or

demonstrate adequate efforts to discharge his duties. Furthermore, the reasons given do not justify the failure to submit the financial statements within the stipulated timeframes. Timely submission of financial statements is viewed strictly as the disclosure of material information is of paramount importance to endure a fair and orderly market for securities that are traded in Bursa. This ultimately will aid investors to make the best informed investment decisions.

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[21] I have scrutinised the facts before me and I am satisfied that Bursa Malaysia had acted in accordance with the relevant principles prescribed by law. Bursa Malaysia had taken into consideration the reasons given by the applicant in making its decision, both at the Disciplinary Committee level as well as at the Appeals Committee. It is entirely up to Bursa Malaysia to then decide whether to accept it or to reject such explanation.

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[22] It is not this court's role to determine whether or not Bursa Malaysia should accept or reject such explanation. The court should not substitute its own opinion for the decision made a body which the Parliament had entrusted that function.

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[23] The court's rule is confined only to a secondary review while the primary decision would be with the Bursa Malaysia. Lord Bridge explained the primary and secondary review in *R v. Sec of State for Home Deptt Ex p Brind* [1991] IAC 696 as follows:

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The primary judgment as to whether the particular competing public interest justifying the particular restriction imposed falls to be made by the Secretary of State to whom Parliament has entrusted the discretion. But, we are entitled to exercise a secondary judgment by asking whether a reasonable secretary, on the material before him, could reasonably make the primary judgment.

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[24] The test to be applied is as stated in the famous *Wednesbury's* case [1947] 1 KB 223. Lord Green in this case said that when a statute gives a discretion to an administrator to make a decision, the scope of judicial review would remain limited. He said that interference was not permissible unless one or the other of the following conditions were satisfied, namely the impugned decision was contrary to the law, or relevant factors were not considered, or irrelevant factors were considered, or the decision was one which no reasonable person could have taken. These

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- A principles were consistently followed in Malaysia to judge the validity of administrative action. (See *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147, *Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh* [1997] 2 CLJ 11, *Malayan Banking Bhd v. Association of Bank Officers Peninsular Malaysia & Industrial Court* [1988] 1 CLJ 276; [1988] 1 CLJ (Rep) 183).

C [25] The appellant failed to demonstrate to the court that there was procedural impropriety involved in the decision making process nor could it say that the impugned decision was based on grounds of illegality or irrationality. To demonstrate that a different conclusion could have been arrived at is not sufficient to warrant an order of *certiorari*.

D [26] As for the second and third issue, I will take them both together. Bursa Malaysia replied that the applicant had already submitted written submissions detailing the full circumstances leading up to and the reasons for the delay in submitting the financial statements. Apart from that, the applicant had also indicated that three of HHCCB's directors would be attending the meeting. According to Bursa Malaysia, the absence of any one of its directors does not prejudice HHCCB as the decision were only made after considering all of the detailed reasons furnished by the applicant in writing.

F [27] The attendance in person, according to the Enforcement Procedures Against Director(s) of Listed Issuers In Respect Of The Alleged Breach Of The Listing Requirements Of Bursa Malaysia Securities Berhad, is not a matter of fundamental right. Directors may request for an oral hearing and must provide detailed justification as to why the matter cannot be adequately determined based on written submissions but the ultimate decision is based upon the Listing Committee, Disciplinary Committee or the Appeal Committee accordingly. This is the procedure that has been laid out for the applicant in relation to the enforcement proceedings that is to be taken against him and was attached together with the letter by Bursa Malaysia dated 2 October 2007.

I [28] Looking at the procedures and steps taken by Bursa Malaysia and the issues raised by the applicant, I do not find any reason for the court to impede with the decision that was concluded by Bursa Securities, the regulators responsible for

operation and maintenance of securities exchange in Malaysia. It appears that Bursa Securities had taken into consideration the relevant facts which were submitted by the applicant. Lord Bingham did mention this in *R v. International Stock Exchange of the UK and Ireland Ltd, ex parte Else Ltd* [1993] 1 QB 534, at p. 552 where he said:

The courts will not second guess the informed judgment of responsible regulators steeped in knowledge of their particular market.

[29] Lastly, I would borrow what my learned sister, Hadhariah Syed Ismail JC, had concluded in *Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v. Bursa Malaysia Bhd* [2010] 6 CLJ 581 where she said:

The court should be slow to interfere with the decision of Bursa which had been vested with the power to decide freely, fearlessly and without a prospect of the correctness of their decision being investigated in protecting the public interest.

[30] For the reasons above, I dismissed this application with costs of RM2,000 to the respondent.

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